

*United States Court of Appeals
for the Second Circuit*



**PETITION FOR
REHEARING
EN BANC**

ORIGINAL
WITH PROOF
OF SERVICE

75-3043

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P/S

75-3045

75-3046

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

Sullivan & Cromwell,

Petitioner,

v.

Honorable Constance Baker Motley,
United States District Judge, for
the Southern District of New York,

Respondent.

Diane Serafin Blank, etc.,

Plaintiff,

v.

Sullivan & Cromwell,

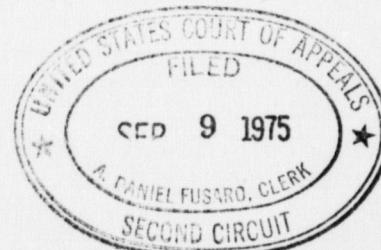
Defendant.]

Same Caption

Same Caption

PETITION FOR REHEARING IN BANC

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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United States District Judge, for :
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Same Caption 75-3045
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PETITION FOR REHEARING IN BANC

1. Petitioner, Sullivan & Cromwell ("S&C"), a partnership in the practice of law, seeks a rehearing of three related orders of this Court filed, without opinion, August 26, 1975. One order (75-3043) denied a petition for a writ of mandamus directing Judge Constance Baker Motley to vacate her order that the action* be maintained as a class

* Diane Serafin Blank, individually and on behalf of others similarly situated, Plaintiff, against Sullivan & Cromwell, Defendant, (75 Civ. 189) in the District Court for the Southern District of New York. It is referred to in this petition as "the action".

action. Another of the orders (75-3045) denied a petition for mandamus directing Judge Motley to disqualify herself. The third (75-3046) denied a petition for mandamus directing Judge Motley to vacate an order denying S&C's motion to compel discovery.

2. A single petition for rehearing is made because the three orders are related and, in part, involve the same circumstances. It is believed that they were considered together and the petitions should, in any event, be reconsidered together.

3. A rehearing in banc is suggested for the questions presented are of importance (one involves application of 28 USC 455 as amended December 1974, relating to disqualification of judges, on which there has been little judicial exposition). And the petitions denied by the orders the Court is asked to rehear, sought the vacating of orders that violated a constitutional provision, statutes and controlling decisions.

Statement of Facts

4. Diane Serafin Blank ("Blank"), Plaintiff in the action, then a law student, applied in October 1970 for a position with S&C. She was not offered employment, but

three of her classmates (one a woman and all with grades superior to Blank's) were employed by the firm. Blank claims she was denied employment because of her sex, and brought action in 1975 to redress the alleged discrimination.

5. Blank sought, in the action, to represent other women who were or would have been denied employment by S&C. Under the Court Rules, Blank was required to move for class certification before May 16, 1975. The motion was of critical importance because its denial would have been the "death knell" of the action. An extension of time to move and an extended schedule (60 days) for the filing of answering and reply briefs were ordered by Judge Motley. The extension was granted at Blank's request, for no apparent reason,* over S&C's repeated objection. On June 2, 1975, 3 business days after the motion for class certification was made, and 25 days before S&C's answering affidavit was due, Judge Motley countermanded the extension order and granted the motion for class certification. The motion was granted at a pretrial conference. S&C was not aware that the motion for class

* At first Blank asked for an extension on the ground that S&C would seek one. When S&C assured the Court it did not want an extension, it was, nevertheless, granted.

certification was to be considered, for the motion was returnable in August 1975. At the beginning of the meeting, Judge Motley announced that it appeared that class status should be granted. She offered S&C's counsel an opportunity (for which he was unprepared) to present "new" or "involved" questions or "something peculiar" about Blank, that would justify denial of class standing. After granting the application to continue the case as a class action, Judge Motley offered the attorney for S&C an opportunity to submit written opposition to the motion, saying, "If you have something you want to submit you can go ahead and submit it for the record."

6. S&C did have grounds, mentioned at the June 2nd conference, for opposing class certification. They were that Blank did not have a cause of action (she was not offered employment because others then employed as lawyer-associates were found more qualified in accordance with objective standards*), and that the Court did not have jurisdiction of the action (Blank's action was time-barred for she did not file a complaint with the Equal Employment

* All but one of the very many law firms to which Blank applied, also did not find her as qualified as other candidates. The single law firm that offered her a position had previously employed her during summer periods.

Opportunity Commission until after the expiration of the statutory period). Judge Motley was asked by S&C's counsel to conduct a hearing on the jurisdictional question but refused to do so.

7. There was a clear abuse of discretion in the decision that Blank was to represent the class* before the facts were canvassed. S&C had, at the least, the right to a consideration of the circumstances that might have constrained an unprejudiced Court to deny class standing in the fair exercise of its discretion. Certainly S&C was entitled to have the Court take into account, in exercising the discretion it has to grant or deny class status, the facts that Blank, having been continuously employed, has no stake in the class position, the inordinate delay in filing Blank's claim with the EEOC, and the delay of more than four years in bringing the action.

8. S&C did not submit affidavits** in opposition to the motion for class certification after it was granted, for it was apparent, from the comments made by Judge

* defined in Judge Motley's order of July 14, 1975 as "all women in the labor pool from which defendant [S&C] must draw its female law associates".

** Judge Motley notified the parties that she would not accept briefs on any pretrial motion unless she specifically authorized them.

Motley at the pretrial conference, and from her rulings, that the submission would be merely a formality.

9. Judge Motley granted class certification suddenly, and without notice to S&C and without a meaningful hearing, in order to furnish grounds for overruling S&C's objections to certain of Blank's interrogatories. S&C objected to the interrogatories on the ground that they were not relevant and would not be relevant until class standing was ordered. By summarily granting class certification, Judge Motley disposed of the objection.

10. At the June 2nd conference, Judge Motley also decided a motion made by S&C to compel pretrial disclosure. The motion was made because Blank and her attorney frustrated the deposing of Blank by long argument during the deposition, by refusal to answer questions, by giving patently false and evasive answers, and by the attorney's suggesting answers to Blank. Blank had not denied the charges of obstructing discovery. Judge Motley failed to disapprove of or to forbid the conduct complained of, except to limit Blank's attorney's arguments at the continuance of the examination. In deciding the motion,

Judge Motley also limited inquiry with respect to one of S&C's affirmative defenses, to the question of whether Blank conspired to bring baseless actions by "making false statements". If the (predictable) answer was "no", Judge Motley ruled, further inquiry could not be made.

11. S&C requested Judge Motley to disqualify herself because of her evident prejudice in favor of Blank's or against S&C's cause. Judge Motley's bias is, it is believed, due to her early identification with others, including women lawyers, who claimed that they, as a class, suffered discrimination in employment. Judge Motley's prejudice was evidenced by her grant of substantive relief to Blank without notice or an adequate hearing, in order to grant other relief to Blank to which she was not entitled. Judge Motley's prejudice was evidenced also by her ignoring the requirements of due process, established procedures, black letter rule, and clear statutory mandate and case law, in order to reach conclusions favorable to Blank. Judge Motley refused the request that she disqualify herself. In deciding that the affidavits requesting her disqualification "are as a matter of law, clearly insuffi-

cient" because they did not show personal bias on her part,* Judge Motley relied on superseded legal authority.

Conclusion

12. It is respectfully submitted that this Court erred in denying S&C's petitions for mandamus. Mandamus is the only appropriate remedy when a judge has shown bias and refused to disqualify himself or herself because of a misapprehension of the law. It is the appropriate remedy when a District Judge ignored prescribed procedures and denied due process in granting an application for class certification, which was of crucial importance in the action, and when a District Judge relied on incorrect and superseded legal standards in determining other motions.

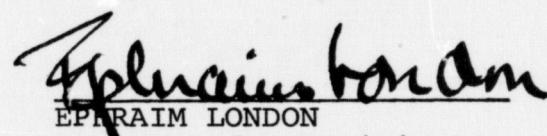
For the reasons outlined in this petition, and in the petitions to the Court for writs of mandamus (to which the Court is respectfully referred), the petitions for writs of mandamus should be reconsidered by the

* Judge Motley apparently believed it necessary that the request for recusal allege that she had some personal interest in the litigation, or a relationship or personal association with one of the parties.

Court sitting in banc, and on rehearing the three orders of this Court made August 26, 1975 in these proceedings should be vacated, and answers to the petitions for writs of mandamus should be ordered.

Dated, New York, N. Y.
September 8, 1975

Respectfully submitted,



EPHRAIM LONDON
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212-826-1600

I certify that I have examined the foregoing petition and that in my opinion it is well-founded and entitled to favorable consideration of the Court and it is not filed for the purpose of delay.

Epluau Mdn
Attorney for Petitioner

PROOF OF SERVICE

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

SCOTT J. BURNHAM, being duly sworn, deposes and says:

1. I am not a party to this action, am over 18 years of age and reside in the City of New York.
2. On September 9, 1975, I served the within Petition for Rehearing In Banc upon Hon. Constance Baker Motley, the Respondent, by filing two (2) copies thereof with the Law Clerk at her Chambers, United States Courthouse, Room 2001, that being the method of service directed by Judge Motley.

Scott J. Burnham

Scott J. Burnham

Sworn to before me this
9th day of September, 1975.

Franklin S. Bowden

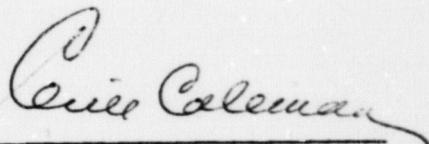
FRANKLIN S. BOWDEN
Notary Public, State of New York
No. 41-0846800
Qualified to New York County
Commission Expires March 30, 1977

PROOF OF SERVICE

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

Cecile Coleman, being duly sworn, deposes and says:

1. I am not a party to this action, am over 18 years of age and reside in the City of New York.
2. On September 9, 1975, I served the within Petition for Rehearing In Banc upon Harriet Rabb and Howard J. Rubin, Esqs., attorneys for Plaintiff Diane Serafin Blank, at 435 West 116th Street, New York, N. Y. 10027, the address designated by said attorneys for that purpose, by depositing two (2) copies of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.


Cecile Coleman

Cecile Coleman

Sworn to before me this
9th day of September, 1975

Frank L. Pizano

FRANKLIN G. BOWEN
Notary Public, State of New York
No. 41-0349600
Qualified in New York County
Commission Expires March 30, 1977